IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6759 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BA BRAHMAKSHATRIYA RC TECHNICAL INSTITUTE

Versus

DIRECTOR OF TECHNICAL EDUCATION

Appearance:

1. Special Civil Application No. 6759 of 1999

MR KB PUJARA for Petitioner No. 1

Mr. Siraj Gori, AGP for Respondent No. 1-2

RULE SERVED BY DS for Respondent No. 1,3-2

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 22/12/2003

ORAL JUDGEMENT

Heard learned advocate Mr. Pujara for the

petitioner and Mr. Gori, learned AGP for the respondent authorities. The facts of the present petition, in short, are to the effect that the petitioner, a degree holder in Electrical Engineering was appointed as Demonstrator in the RC Technical Institute by order dated 15.9.1966 and he resumed his duties on 19.9.1966. Thereafter, the petitioner was duly selected and appointed by way of direct recruitment as Assistant Lecturer by order dated 13.4.1982. The petitioner was, thereafter, upgraded as lecturer by order dated 9.5.92 w.e.f. 30.4.1987. Thereafter, the petitioner was given the senior scale of Rs.3000-5000 and selection grade of Rs.3700-5700 by order dated 27th July, 1995 w.e.f. 30th April, 1995. Thereafter, the respondents by order dated 18th June, 1998, cancelled the selection grade granted in favour of the petitioner with retrospective effect from 30th April, 1995 and ordered for recovery of the excess amount. That order was challenged by the petitioner before this court by filing special civil application no. 4989 of 1998 which was allowed by this Court (Coram : Miss Justice R.M. Doshit) on 22nd April, 1999. Under the said order, this court set aside the order dated 18th June, 1998 and it was kept open for the respondents to pass appropriate orders after giving reasonable opportunity of hearing to show cause to the petitioner. Thereafter, the respondents were to take further action after giving reasonable opportunity of hearing to the petitioner. Then, the reasonable opportunity was given to the petitioner by the respondents and thereafter, the respondents passed order on 27th August, 1999 adverse to the petitioner and the recovery has been ordered against the petitioner and the said order dated 27th August, 1999 is under challenge in this petition.

In this matter, on behalf of the respondent No.2, one Mr. V.U. Upadhyay, Deputy Director working in the office of the respondent no.2 has filed affidavit in reply wherein it has been contended that the petitioner is not entitled for the selection grade and that was rightly withdrawn or cancelled by the respondents. In present petition, petitioner is not challenging the order of withdrawal of selection grade and as the petitioner has already retired from service. In the present petition, the petitioner is praying for directing the respondents not to effect recovery in view of the order dated 27th August, 1999. The legality, validity and propriety of the order dated 27th August, 1999 need not be gone into because the petitioner has already retired from service on 2nd November, 2000. Against the petition, all the averments made by the deponent on merits that the petitioner is not entitled for the

selection grade, learned advocate Mr. Pujara has raised question in this petition that even considering the order dated 27th August, 1999 cancelling the selection grade, whether recovery is permissible or not? Reply filed by the respondents is relating to the merits but the reply is not of much relevance in respect of this aspect. According to the respondents, as averred in the reply, the petitioner has miserably failed to discharge his moral obligations and through due process of rescreening the competent committee took the step of withdrawing the selection grade and granting his senior scale of Rs.3000-5000 w.e.f.30.4.95. The deponent has submitted that he petitioner has approached the Court to have the privilege of selection grade and if not to get the recovery waived under rule 57A of the BCSRs. According to the deponent, this case is neither of incorrect seniority nor wrong interpretation of the relevant Government Resolution but the issue arose just because the verification of the pay scale of demonstrator in Electrical Engineering was left out because of the existence of similarly designated higher pay scale posts sanctioned at later dates to match responsibilities and duties in polytechnics and degree college for degree/diploma disciplines. Thus, according to the respondents, the petitioner herein is not entitled to the benefit of rule 57A of the BCSRs to have the benefit of waiving off recovery. The State had initiated immediate action to review the case and a long period such as that of 12 years has not passed under which the petitioner can claim the benefit of waiving of recovery. In para 8 of the reply, the respondent has submitted that the petitioner is not entitled for the benefits of rule 57A of the BCSRs.

Relevant averments made by the deponent in his affidavit in reply are reproduced as under:

> "This case is neither of incorrect seniority nor wrong interpretation of the relevant GR but the issue arose just because the verification of the pay scale of Demonstrator in Electrical Engineering was left out because of the existence of similarly designated higher pay scale posts sanctioned at later dates to match responsibilities and duties in polytechnics and degree college for degree/diploma disciplines. "

Therefore, it is a clear case of mistake committed by the respondents at the time of verification of the pay scales of demonstrator in electrical engineering which was left out because of the existence

of similarly designated higher pay scale post sanctioned at later dates. In view of these facts, now the only question arising is as to whether the respondents are entitled to recover any amount from the petitioner in view of the order dated 27th August, 1999 or not?

Learned advocate Mr. Pujara appearing for the petitioner has submitted that the division bench of this court has taken a view that once any benefit has been given to the concerned employee by erroneous interpretation or by mistake of the department and that benefit has been enjoyed by the employee and after some time, if it has been brought to the notice of the authority that the said benefit has been incorrectly or wrongly given, then, they can rectify the mistake but at the same time, they are not entitled to recover the amount which has already been paid to the employee concerned on the basis of the mistake. He, therefore, submitted that the Division Bench of this Court has taken a view that for such an mistake on the part of the department, an employee concerned cannot be penalized and, therefore, it has been observed by the Court that the recovery of the payment of an excess amount made to the employee concerned for no fault on his part appears to be wholly unjustified, relied upon the decision given in the Letters Patent Appeal No. 578 of 2000 in Special Civil Application No. 2196 of 1999 dated 4th April, 2001. The relevant observations made by the Division Bench of this Court in the said matter are reproduced as under:

"... After hearing the learned Counsel for the parties, we are of the opinion that the appellant should not be made to suffer for the mistake committed by the Board. As is mentioned above, the mistake is not merely clerical/arithmetical. Before implementing the scheme of , the appellant was holding the post of Sub Engineer and he was given the up-gradation and pay scale of Rs.2200-4000 prescribed for the post of Deputy Executive Engineer. Under the Scheme, at the relevant time, it was found that he was entitled to the pay scale of Rs.2200-4000 and not to the interim scale of Rs.1640-2900. It is only when an audit objection was raised that the Board reconsidered its earlier decision that the higher pay scale granted to the appellant as an interim scale was clearly a mistake. The difference of amount of salary payable on fixation in the higher grade scale was duly credited in the Provident Fund Account. SO far as correction of

the mistake is concerned, the Board was right in rectifying the mistake by reducing the scale granted to the appellant in the upgraded post from 2200-4000 to 1640-2900. However, recovery of the amount excess paid to the appellant at this point of time amounts to imposing a sort of penalty or punishment. The mistake was committed by the Board, for which the appellant should not be penalized. Recovery of the excess payment made to the appellant for no fault on his part appears to be wholly unjustified. [Emphasis supplied].

In the aforesaid matter, the Division Bench of this Court has, after observing as aforesaid, ordered that any recovery effected pursuant to the decision of the Board be refunded or readjusted suitably in favour of the appellant therein.

He has also relied upon the decision of this Court in the matter of Babra Kelavani Mendal Trust Through Trustee & Anr. v. Madhurikaben J. Mirani & Ors. reported in 2003 (3) GLR . 2166 wherein this Court has considered the the question of benefit of higher grade enjoyed by the employee for more than nine years which was withdrawn and recovery was ordered without any opportunity to the employees, in violation of the principles of natural justice and it was held by this court that the order in question was rightly set aside by the Education Tribunal.

He has also relied upon the provisions of rule 57-A of the Bombay Civil Service Rules, which is important for the purpose of deciding the present petition. Same is, therefore, reproduced as under:

"57-A () Notwithstanding the provisions contained in these rules, the pay of a Government servant whose promotion or appointment to a post is found to be or to have been erroneous on the basis of facts, e.g. incorrect seniority, failure to apply any relevant rules or orders correctly, shall be regulated in accordance with any general or special orders issued by the Government in this behalf.

(ii) When any rule or order regulating pay is made with retrospective effect the pay of a Government servant affected by such order or rule, shall be fixed notionally as if the rule, order were applicable in his case but the

Government servant concerned shall not be called upon to refund the resultant amount of overpayment on account of pay and allowances.

Provided that in case where the erroneous promotion or appointment was given on the basis of false information furnished by the concerned Government employee, departmental action shall be taken against him and the resultant amount of over payment on account of pay and allowances shall also be recovered from him."

He has also relied upon the decision of this Court in the matter of NARANBHAI GOVINDBHAI PATEL Versus DISTRICT DEVELOPMENT OFFICER reported in 2003 (III) CLR page 779. Reliance was placed by him on para 13, 14, 16, 17, 18 and 19 of the said judgment and has submitted that the matter at issue is squarely covered by the said decision of this Court wherein this Court has considered rule 57A of the BCSRs and other relevant decisions of the apex court and High Court.

Learned AGP Mr. Gori appearing for the respondent authorities submitted that the respondents have filed detailed affidavit in reply wherein the respondents have specifically submitted that the provisions of rule 57A of the BCSRs are not applicable and it is not the case of interpretation of award or any Government Resolution and, therefore, once it is found that the benefit has wrongly been given to an employee, employer has always right to rectify such mistake and for rectifying such mistake, employer has also right to recover the any, paid in excess to the entitlement of such an employee and, therefore, the respondents are right in effecting recovery against the present petitioner. On the basis of the aforesaid submissions, he prayed for dismissing the present petition. Except the aforesaid submission, no other submissions were made by the learned AGP Mr. Gori on behalf of the respondents.

I have considered the submissions made by the learned advocates for the parties. The question is that the order dated 27th August, 1999 has been passed by the respondents after affording reasonable opportunity to the petitioner. The respondents have passed detailed order which I have perused. Last three lines of the said order are important in respect of the facts of the present case. Prior to the said last three lines, the respondents have directed that as per the earlier order dated 18.6.98, selection grade granted w.e.f.30.4.95 is

cancelled and only the senior scale has been granted w.e.f. 30.4.95. Thereafter, the Technical Education Director has ordered that the excess amount of salary, dearness allowance from the petitioner tobe recovered by 36 equal installments within that limit in such a manner that it may not cause inconvenience to the petitioner and as consented by him. That part of the order is under challenge wherein the respondents have ordered for recovery of the excess amount paid to the petitioner.

Learned advocate Mr. Pujara, no doubt, submits that on merits also, the order in question is wrong and the petitioner is also entitled for the benefit of selection grade. However, considering the fact that the petitioner has already retired from service on 2nd November, 2000, according to my opinion, there is no question of examining the legality, validity and propriety of the order cancelling the benefit of selection grade by the respondents by order dated 27th August, 1999. This Court is, therefore, not examining legality, validity and propriety of the order dated 27th August, 1999 and this Court is considering the only question as to whether the respondents are justified in recovering the excess amount from the petitioner or not. Rule 57-A (ii) specifically provides that when any rule or order regulating pay is made with retrospective effect the pay of a Government servant affected by such order or rule, shall be fixed notionally as if the rule, order were applicable in his case but the Government servant concerned shall not be called upon to refund the resultant amount of overpayment on account of pay and allowances. Thus, as per rule 57-A (ii) of the BCSRs, the pay of a Governments servant affected by such order or rule is required to be fixed notinoally as if the rule or order were applicable in his case and consequently, as per the said rule, such Government servant cannot be called upon to refund the resultant amount of over payment on account of pay and allowances. Proviso to Rule 57-A is providing that in case where the erroneous promotion or appointment was given on the basis of false information furnished by the concerned Government employee, departmental action shall be taken against him and the resultant amount of over payment on account of pay and allowances shall also be recovered from him.

Though the respondents are contending that rule 57A is not applicable in this case, they have not pointed out as to how and why it is not applicable to this case. They have not been able to point out any exception in that regard. As such, the respondents are required to point out and prove that the case would be governed by

the proviso to rule 57A of the BCSRs which provides that in case where the erroneous promotion or appointment was given on the basis of false information furnished by the concerned Government employee, departmental action shall be taken against him and the resultant amount of over payment on account of pay and allowances shall also be recovered from him. However, bare reading of the affidavit in reply filed by the respondents makes it clear that the grant of senior scale and selection grade was not the result of any false information furnished by the petitioner and, therefore, they are required to recover the same from the petitioner. I am, therefore, of the view that rule 57A of the BCSRs would apply to the facts of this case which provides that the pay of a Government servant whose promotion or appointment to a post is found to be or to have been erroneous on the basis of facts, e.g. incorrect seniority, failure to apply any relevant rules or orders correctly, shall be regulated in accordance with any general or special orders issued by the Government in this behalf and the pay of a Governments servant affected by such order or rule is required to be fixed notinoally as if the rule or order were applicable in his case and consequently, as per the said rule, such Government servant cannot be called upon to refund the resultant amount of over payment on account of pay and allowances because, looking to the facts of the present case, benefit of senior scale and selection grade were granted in favour of the petitioner by order dated 27.7.1995 w.e.f.30.4.1995 and the name of the petitioner is BA BRAHMAKSHATRIYA which is at page 27, item no.7 wherein the case of the petitioner has been considered for upgradation in the post of lecturer in the pay scale of Rs.3000-5000 and 3700-5700. Accordingly, said benefits were given by the respondents to the petitioner with effect from 30.4.1995. Thus, considering his seniority and qualification etc., benefit of senior scale and selection grade both were given to the petitioner with retrospective effect from 30.4.1995. Such benefit given to the petitioner were cancelled by order dated 18.6.1998 without giving any opportunity to the petitioner and therefore, initially this Court directed the respondents to pass appropriate orders in that regard after hearing the petitioner and thereafter, after providing reasonable opportunity to the petitioner, the respondents ordered on 27th August, 1999 and thereby cancelled the grant of selection grade and granted only senior scale with effect from 30.4.1995. Means, the petitioner who was upgraded in the post of lecturer has been treated as cancelled and he has been given the senior scale alone and the selection grade of Rs.3700-5700 has been treated as cancelled and the

respondents are also seeking to recover the resultant amount of overpayment on account of pay and allowances whereas as per rule 57A(ii) of the BCSRs, they are required to be fix the pay of the petitioner notinoally as if the rule or order were applicable in his case. Therefore, considering the language employed in section 57A of the BCSRs, according to my opinion, the case of the petitioner is squarely covered by the provisions contained in rule 57A of the BCSRs and the respondents have not pointed out as to why it would not apply to the case of the petitioner. In view of that, according to my opinion, now the respondents are not entitled to call the petitioner to refund the resultant amount of over payment which was made to the petitioner on account of earlier order which was passed in favour of the petitioner granting benefit of senior scale and selection grade by order dated 27th July, 1995. I am, therefore, of the opinion that rule 57A alone is enough to conclude that the respondents are not entitled to call upon the petitioner to refund the said amount. Over and above that, considering the observations made by the Division Bench of this Court as referred to hereinabove, wherein the division bench of this Court has considered that if such an amount has been permitted to be recovered from the employee, then, it would amount to penalizing the employee concerned for no fault on his part. Further, in the instant case, the respondents have not been able to point out that there is any fraud was committed by the petitioner or that the petitioner made any misrepresentation and, therefore, selection grade as well as senior scale both were granted to the petitioner. No such averments have been made by the respondents in their detailed affidavit and in the order dated 27th August, 1999 also, the respondents have not pointed out any such thing. Admittedly, by order dated 27th July, 1995, selection grade as well as senior scale were granted after verifying necessary service rules and, thus, it cannot be said that such benefits were granted in view of any misrepresentation and/or fraud on the part of the petitioner and, therefore, recovery of the excess amount would amount to penalty to the petitioner. Therefore, according to my opinion, the respondents are not entitled to recover any amount from the petitioner in view of the order dated 27th August, 1999 as the petitioner has already retired from service on 2nd November, 2000. According to my opinion, the matter at issue is squarely covered by the earlier decision of this court in the matter of NARANBHAI GOVINDBHAI PATEL Versus DISTRICT DEVELOPMENT OFFICER reported in 2003 (III) page 779. Para 13, 14, 16, 17, 18 and 19 of the said judgment of this court which are relevant for the purpose of present

petition are reproduced as under:

"13. Now, the next question is whether such an orders could be passed by the respondent after the petitioner retired on 31.1.1998 or not. This question has recently been examined by the Rajasthan High court in the matter of Narain Lal v. State of Rajasthan and Ors. reported in 2003 II CLR 1018. It was a matter relating to recovery of the amount wrongly paid. The petitioner therein retired employee challenged recovery of the amount wrongly paid to him without any fault on his part. In view of such facts, it was held by the Rajasthan High Court that the payments wrongly made without any fault on the part of the employee, having retired, recovery from him will cause legal injury. It has also been held that a legal right has accrued to him and, therefore, after his retirement, no recovery can be ordered against the retired employee. IN the said matter, the Rajasthan High Court has considered entire case law on this subject in para 9 to 15 and has observed as under in para 16, 17, 18 and 19:

"16. Thus, from the rulings of the Honourable Supreme Court as well as this Court just quoted above, it is clear that in case the court finds that any benefit was achieved by a person without there being any fault on his part in receiving such benefit, it would be just and proper to allow him to retain such benefit.

17. In the present case, the benefit of Rule 26-A of the RSR was given to the petitioner and such benefit was received by the petitioner without there being any fault on his part, but mistake was committed by the respondents and, therefore, in such circumstances, it would be just and proper to allow the petitioner to retain such benefits.

18. Apart from this, when the person to whom payment was wrongly made without there being any fault on his part and that person has retired, in such a case, after his retirement, to ask such person to pay amount already received would necessarily causes a legal injury to him

as in the meanwhile he would have utilized that amount and, therefore, from this point of view also, it can easily be said that a legal right has accrued in favour of the petitioner and under Article 226 of the Constitution of India, this Court has power to grant consequential relief such as not to recover the amount from the person to whom it was wrongly paid without there being any fault on his part.

19. Thus, the above question formulated by this court is answered in the manner that the amount paid to the petitioner wrongly on his fixation after giving him benefit of Rule 26 of the RSR without any fault on the part of the petitioner cannot be permitted to be recovered from him.

15. xxx

16. This question has also been considered by the Punjab and Haryana High Court in the matter of Ganesha Basti, Bhatinda v. State of Punjab and others reported in 2003 Lab IC 1029. The P. & H. High Court has considered the decision of the Hon'ble apex court in the matter of Sahib Ram v. State of Haryana, 1995 AIR SCW 1780 : 1995 (1) SCT 668 and has observed as under in para 6 of the judgment:

"The recovery is sought to be effected without complying with the principles of natural justice and giving an opportunity of hearing. The recovery could be set aside on this short ground alone. However, we have gone through the order to find out the justification in passing the impugned order. The pay of the petitioner was stepped up by the respondents without any misrepresentation on the part of the petitioner. Learned counsel for the petitioner has relied upon Sahib Ram v. State of Haryana, 1995 [1] SCT 668 [1995 AIR SCW 1780] to contend that the recovery cannot be effected if there is no misrepresentation on the part of the petitioner."

17. Therefore, in the facts and circumstances of the present case and also in view of the law laid down by this court in the matter of M.M. Patel versus State of Gujarat reported in 2003 (1) GLH 697, as well as the decision of the Punjab and Haryana High Court in the matter of Ganesha Basti, Bhatinda v. State of Punjab and others reported in 2003 Lab IC 1029, the respondents are not entitled to recover any amount from the petitioner as it was not the case of the respondents that this scale was received by the petitioner on the basis of any fraud or misrepresentation before the department.

18. The fourth question framed by this court is covered by the provisions made in rule 57A of the Bombay Civil Service Rules, 1959. Relevant rule 57A of the said Rules is reproduced as under:

"57-A (i) Notwithstanding the provisions contained in these rules, the ay of a Government servant whose promotion or appointment to a post is found to be or to have been erroneous on the basis of facts, e.g. incorrect seniority, failure to apply any relevant rules or orders correctly, shall be regulated in accordance with any general or special orders issued by the Government in this behalf.

(ii) When any rule or order regulating pay is made with retrospective effect, the pay of a Government servant affected by such order or rule, shall be fixed notionally as if the rule order were applicable in his case but the Government servant concerned shall not be called upon to refund the resultant amount of overpayment on account of pay and allowances;

Provided that in case where the erroneous promotion or appointment was given on the basis of false information furnished by the concerned Government employee, departmental action shall be taken against him and the resultant amount of over payment on account of pay and allowances shall also be recovered from him."

19. Considering the provisions contained in rule 57A of the said Rules which provides that when any rule or order regulating pay is made with retrospective effect, the pay of a

> Government servant affected by such order or rule, shall be fixed notionally as if the rule order were applicable in his case but the Government servant concerned shall not be called upon to refund the resultant amount of overpayment on account of pay and allowances. In the facts of the present case also, salary of the petitioner was fixed initially in the pay scale of Rs.550-900 which was subsequently revised to Rs.1640-2900 by the respondents and it is the case of the respondents it was the wrong committed by the department and such scale was given through mistake of the department and the petitioner is, in fact, not entitled for such a pay scale and in view of such facts, provisions of rule 57 A of the said Rules would squarely apply to this case because it is not the case of the respondents that such scale was given to the petitioner on the basis of false information furnished by the petitioner, as per the proviso to rule 57A of the said Rules. Therefore, in view of the provisions of rule 57A of the BCSRs also, which would normally apply to the respondent department being the panchayat department, the respondents are not entitled to call upon the petitioner to refund the resultant amount of over payment on account of pay and allowances and, therefore, considering this rule 57A of the said rules, the respondents are not entitled to recover any amount and they are not entitled to call upon the petitioner to refund the said amount. "

Therefore, considering the division bench judgment of this court referred to above and also considering the aforesaid judgment of this court and the provisions of rule 57A of the BCSRs and proviso thereto, according to my opinion, present petition is required to be allowed in part.

Therefore, in the result, this petition is partly allowed. The order dated 27th August, 1999 is hereby quashed and set aside in so far as it relates to the recovery of the resultant amount of overpayment on account of pay and allowances. Respondents are directed not to recover any such resultant amount of overpayment on account of pay and allowances on the basis of the order dated 27th August, 1999. Rule is made absolute in terms indicated hereinabove with no order as to costs.

Dt.22.12.2003 (H.K. Rathod,J.)

Vyas